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Senor Iguana's v. Idaho State Police Appellant's Reply Brief 1 Dckt. 43158

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IN THE SUPREME COURT OF THE
STATE OF IDAHO

★ ★ ★ ★ ★

SEÑOR IGUANA'S, INC. dba SEÑOR
IGUANA'S and MARCIA E. CORONA,

Petitioners-Appellants,

vs.

IDAHO STATE POLICE, BUREAU OF
ALCOHOL BEVERAGE CONTROL,

Respondent.

Supreme Court Docket No. 43158

Bannock County Case No. CV-2014-4955-OC

APPELLANT'S REPLY BRIEF

Appeal from the Sixth Judicial District, Bannock County, Idaho

HONORABLE ROBERT C. NAFTZ, Presiding

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INTRODUCTION

The Director of the Idaho State Police, Alcohol Beverage Control (“ABC”) wrongly attempts to put the entire focus of this appeal on the fact that Señor Iguana’s sent ABC an insufficient funds check with its application to renew its license for 2015. This fact is not disputed. However, this appeal is not about Señor Iguana’s mistake. Instead, this appeal concerns ABC’s failure to comply with clear statutory requirements which led to an unconstitutional deprivation of property. The focus is on whether the “agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion.” I.C. § 67-5279(3). As set forth in the Appellant’s brief, and as further argued herein, Señor Iguana’s believes that ABC’s findings, inferences, conclusions and decisions contained in the Order violated constitutional and statutory provisions, exceeded its statutory authority, were made upon unlawful procedure, were not supported by evidence on the record, and were arbitrary, capricious and an abuse of discretion.

Contrary to ABC’s contention on appeal, ABC in fact took a number of actions and inactions with respect to Señor Iguana’s liquor license that are subject to review on appeal. Even a cursory review of the record on appeal reveals that ABC completely ignore the statutory mandates placed upon it by the Idaho legislature. In particular, ABC ignored statutory law by renewing the liquor license prior to full payment of the application fee being received, thereby providing false notice to Señor Iguana that its renewal was complete. ABC ignored statutory law by continuing to permit Señor Iguana to sell liquor even after ABC was aware that full payment

of the application had not been made thereby providing continued false notice to Señor Iguana that its renewal was complete.

Generally speaking, ABC is correct that it lacks discretion to renew a liquor license after the 31-day grace period has lapsed. However, all of the actions and inactions that ABC took in violation of statutory law occurred *before* the 31-day grace period had lapsed in this case. Rather than complying with the applicable statutes which were clearly designed to place a liquor license owner on notice of a renewal deficiency, ABC instead took actions in violation of these statutes which unlawfully provided false notice to Señor Iguana that the renewal was complete.

On appeal, ABC provides no excuse for its near fraudulent conduct in providing this false notice to Señor Iguana prior to the expiration of the 31-day grace period. Instead, ABC merely argues that, despite the clear language of the applicable statutes, ABC was not required to comply with those statutes prior to the expiration of the 31-day grace period and that any false notice provided by it to Señor Iguana in violation of these statutes should simply be ignored by this Supreme Court. This argument should be rejected on appeal.

Señor Iguana's liquor license is a property right which cannot be taken away without due process. Due process is defined both by the constitution and by statute. The statutory mandate that an incomplete renewal be denied, that a renewal applicant *not* be permitted by ABC to sell liquor if the renewal application is not complete, and that a renewal applicant be allowed a *subsequent* 31-day time period in which to complete the renewal process is all part of the statutory due process afforded by the Idaho legislature with respect to liquor licenses in this State. In violating these statutes and by taking other actions discussed below, ABC falsely placed Señor Iguana in a "gotcha" situation and thereby unlawfully deprived Señor Iguana of its liquor license.

ARGUMENT

I. THE LIQUOR LICENSE WAS RENEWED AND DID NOT SIMPLY EXPIRE BY OPERATION OF LAW; ABC'S ACTIONS AND INACTION ARE AND WERE "AGENCY ACTION" WHICH ARE SUBJECT TO REVIEW.

ABC does not cite to any statutory authority or any binding case law to support its argument that Señor Iguana's liquor license expired by operation of law. ABC cites to *BV Beverage* for the position that liquor licenses expire by operation of law if they are not timely renewed. However, in *BV Beverage* the licensee did not submit a renewal application until months after the 31-day grace period expired, and thus ABC had never received, reviewed or renewed the license prior to the expiration date set forth in the statute. *BV Bev. Co., LLC v. State*, 155 Idaho 624, 315 P.3d 812, (Idaho 2013).

In the present case, Señor Iguana's did submit an application prior to the expiration of the liquor license and ABC actually renewed the liquor license for 2015. The Idaho Supreme Court has not decided a case where ABC received a renewal application, renewed the license, and then later discovered that the check for the renewal fee was returned as an NSF check.

Once ABC renewed the liquor license, the expiration date was extended for another year. As such, the license did not expire by operation of law because the new expiration date had not lapsed. In this case, the expiration date was extended to October 31, 2015.¹ The license that ABC issued to Señor Iguana's and then wrongfully took away stated in big bold text that it "**Expires: 10/31/2015.**"² There is nowhere in the Idaho Code or in binding case law that states that a renewed liquor license would be disregarded and that the prior license would be deemed to have expired if the check sent to ABC to renew the license was insufficient.

¹ R. p. 97

² Id.

Rather, the Instructions for Completing Annual Renewal Application that ABC sends to licensees states that the repercussion of sending “checks returned for insufficient funds or account closed” is the licensee being subjected to “a **\$20 processing fee** and possible administrative action.”³ If the result of sending an NSF check with a licensee’s renewal application is forfeiture and expiration of the license by operation of law, ABC should not tell licensees that the consequence is simply a \$20 processing fee and possible administrative action. Contrary to these instructions, ABC now takes the position that payment of the renewal fee together with the \$20 processing fee is not acceptable, and further claims that the “possible administrative action” is actually unnecessary, and that the license simply expired without the agency taking any action whatsoever.

In *BV Beverage* the Supreme Court stated that agency action is “an agency’s performance of, or failure to perform, any duty placed upon it by law. *BV Bev. Co., LLC v. State*, 155 Idaho at 628, 315 P.3d 812, (Idaho 2013). The Supreme Court noted that ABC has a duty to process renewal applications. *Id.* In the present case, unlike the case of *BV Beverage*, ABC received, reviewed, and processed Señor Iguana’s renewal application, renewed the license, permitted Señor Iguana’s to buy and sell liquor under the renewed license, issued an Order cancelling Señor Iguana’s liquor license, confiscated the renewed license, and ordered Señor Iguana’s to cease and desist selling liquor under the liquor license. In this case, unlike *BV Beverage*, there are multiple instances of agency action for this Supreme Court to review on appeal.

The Order itself clearly establishes that ABC was taking action reviewable on appeal. The Order states that it was entered pursuant to I.C. § 67-5247. That section relating to emergency action by an agency provides that “[a]n agency may act through an emergency

³R. p. 123

proceeding in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.” (Underline added). ABC now attempts to argue that the Order was not an action and that they actually did not act in any capacity that would be subject to review. As noted above, ABC relies heavily on this position because if its actions and inactions are subject to review, it is clear that the Order should be set aside and the license should be restored to Señor Iguana’s.

II. ABC’S FAILURE TO PROHIBIT SEÑOR IGUANA’S FROM SELLING LIQUOR DURING THE 31-DAY GRACE PERIOD WAS AN ACTION AND A VIOLATION OF STATUTORY PROVISIONS.

ABC failed to comply with the requirements placed upon it under I.C. § 23-908(1). This failure to perform its duty resulted in a system that deprived Señor Iguana’s of its liquor license without notice or due process of law. On appeal, ABC claims that it had no obligation to prohibit Señor Iguana’s from selling or dispensing liquor by the drink during the grace period and that I.C. § 23-908(1) puts the burden on licensees to refrain from selling liquor during the grace period if the license wasn’t renewed or was improperly renewed. This argument should be rejected because it is contrary to the plain language of I.C. § 23-908(1), which reads:

Any licensee holding a valid license who fails to file an application for renewal of his current license on or before the first day of the designated renewal month shall have a grace period of an additional thirty-one (31) days in which to file an application for renewal of the license. The licensee **shall not be permitted to sell and dispense liquor by the drink at retail during the thirty-one (31) day extended time period unless and until the license is renewed.**

(emphasis added).

ABC’s interpretation completely ignores the words “be permitted to.” A licensee has no authority to “permit” or “not permit” itself from selling liquor. It is clear under Idaho law that only ABC possesses such authority. Idaho code places this duty to “not permit” the sale of liquor squarely upon ABC. Complying with I.C. § 23-908(1) would have been very simple for

ABC. ABC simply need to remove Señor Iguana's name from the computer system used when liquor is wholesaled in Idaho. Doing this one simple step would have prevented Señor Iguana's from purchasing and selling alcohol. As noted before, the "failure to perform any duty placed upon [an agency] by law" is an agency action. *BV Beverage*, 155 Idaho at 628, 315 P.3d at 816. This inaction by ABC in violation of I.C. § 23-908(1) is agency action that is subject to review.

Further, the duty to not permit a licensee of a non-renewed or improperly renewed license to sell liquor during the grace period is not discretionary. ABC argues that this statute "does not require ABC to take action to prevent a licensee from selling or dispensing alcoholic beverages during the thirty-one (31) day grace period any more than police officers are required to always cite someone for speeding." However, the language of the statute leaves no room for discretion. It states that a licensee "shall not be permitted" to sell or dispense of liquor by the drink during the 31-day grace period. Any interpretation of this statute that creates room for discretion as to whether ABC will or will not allow a licensee in this position to sell liquor during the grace period would be a severe strain on the plain language of the statute.

Moreover, it is clear when reading the Act as a whole that not permitting the sale of alcohol under I.C. 23-908(1) was the intended by the Idaho legislature as the means of placing the licensee on notice that it had not completed renewal of its license – thereby ensuring that the licensee can take full advantage of the 31-day grace period. If there was no statutory means of notifying a licensee about a failure to renew (by not permitting the sale of alcohol or otherwise), there would be no reason for the 31-day grace period.

In this case, not only did ABC permit Señor Iguana's to sell liquor during the grace period, the State actually facilitated Señor Iguana's in selling and dispensing of liquor during the grace period. As the record reflects, the State sold Señor Iguana's alcohol under the liquor

license at least seven times from the date ABC had notice the check bounced until the date that ABC issued the Order cancelling Señor Iguana's liquor license.⁴ ABC knew that Señor Iguana's was buying and selling liquor from the State during the grace period and not only permitted Señor Iguana's to do so, but facilitated Señor Iguana's in doing so.

ABC's failure to comply with I.C. § 23-908(1) by permitting and facilitating Señor Iguana's sales of liquor during the grace period deprived Señor Iguana's of notice that there was an issue or problem with its liquor license. Because ABC did not perform its statutory duty, Señor Iguana's liquor license was cancelled by ABC without Señor Iguana's receiving any due process of law. Forbidding the sale of liquor during the grace period if a license has not been properly renewed is a mechanism that would give a licensee *notice* that its license has not been renewed and will expire if a proper renewal application and fee are not timely submitted. It would put a licensee on notice that the 31-day grace period has begun.

In direct contradiction with I.C. § 23-908(1), ABC wrongly contends that it had no obligation to advise Señor Iguana's that it could not sell alcohol during the grace period. Under this statute, ABC had an obligation and duty to make sure that Señor Iguana's did not sell liquor during the grace period. This duty was not discretionary. Although there is admittedly no statutory requirement that *written* notice be mailed to a licensee, there is a *statutory* requirement in I.C. § 23-908(1) which places a licensee on notice when ABC prevents it from selling alcohol. ABC's failure to perform this duty was a violation of clear and unambiguous statutory provisions, which resulted in Señor Iguana's losing the benefit of the grace period, and the deprivation of Señor Iguana's liquor license without notice or due process of law. This was a

⁴R. pp. 125-131

deprivation of the statutory due process afforded under Idaho law. Señor Iguana's liquor license should be reinstated.

III. SEÑOR IGUANA'S HAD A PROPERTY RIGHT IN THE LIQUOR LICENSE AND HAS BEEN DEPRIVED OF SUCH RIGHT WITHOUT DUE PROCESS OF LAW.

ABC contends that the cases cited by Señor Iguana's in its Appellant's Brief which characterize a liquor license as a property right are distinguishable because they characterize it as between the licensee and a third party, rather than as between the licensee and the State of Idaho. It is Señor Iguana's position that the characterization of a liquor license (like a water right) does not change depending upon the context in which it is discussed. It is always a property right afforded due process protections.

This Supreme Court appeared to agree with this position in *BV Beverage* (2013) where a liquor license was discussed as between the licensee and the State. In that case, the Supreme Court stated that "[i]n *Logan*, the U.S. Supreme Court held that where a system deprives a person of a *property right* without adequate procedural safeguards, that system is unconstitutional." (Italics added). Instead of concluding that a liquor license was not a property right and hence no due process analysis was required, the Supreme Court went on to analyze whether due process rights of a liquor license licensee had been violated where ABC refused to renew the licensee's license. In other words, the Supreme Court appeared to find that a liquor license was in fact a property right as between a licensee and the State subject to due process rights. Señor Iguana's liquor license is a property right.

The U.S. Supreme Court stated that "[w]hile the legislature may elect not to confer a property interest...it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S. Ct. 1148, 1156 (1982)(citations omitted). The Court further stated that,

“minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.” *Id.* The applicable federal law provides that, “[n]o person shall be...deprived of life, liberty, or property, without due process of law,” “nor shall any State deprive any person of life, liberty, or property, without due process of law.” USCS Const. Amend. 5; and USCS Const. Amend. 14 § 1.

Señor Iguana’s paid \$65,000 to acquire its liquor license.⁵ The license can be sold, transferred, or encumbered. It is a property right. ABC makes no attempt to argue that Señor Iguana’s was afforded due process of law or that Señor Iguana’s received any notice that the renewal was incomplete or that its license was going to be lost. There was no due process of law. Instead, ABC argues that “[t]here is nothing in title 23, chapter 9, or the administrative rules governing alcohol beverage control licensing, regulation and enforcement that requires ABC to notify a licensee that the licensee sent a NSF check for its license renewal.” This ignores the mandate of I.C. § 23-908(1). It also ignores the fact that due process rights under the United State’s Constitution require that such notice to be given. Such notice would have been given if ABC had not actually renewed the liquor license and/or had complied with I.C. § 23-908(1).

In this case, ABC sent Señor Iguana’s instructions that minimize and/or misrepresent the consequence of submitting an insufficient check. ABC received and reviewed Señor Iguana’s renewal application and actually renewed the license. ABC permitted Señor Iguana’s to sell liquor under the license during the grace period and actually facilitated the sale of liquor during the grace period by selling Señor Iguana’s liquor under the license during the grace period. These

⁵ R. pp. 120, Par. 4

actions reasonably caused Señor Iguana's to believe that its liquor license had been properly renewed and that there was no reason to take any further action.

Only *after* the grace period expired did ABC step in and issue an Order cancelling Señor Iguana's liquor license and prevent Señor Iguana's from selling alcohol. The Supreme Court has stated that "where a system deprives a person of a property right without adequate procedural safeguards, that system is unconstitutional." *BV Bev. Co., LLC v. State*, 155 Idaho 624, 627, 315 P.3d 812, 815 (2013) citing to *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982). As such, even if the Court finds that ABC was in full compliance with the statutory requirements of title 23, chapter 9, which Señor Iguana's disputes, the Court must find that such system is unconstitutional.

The district court cases that ABC relies upon in this appeal show an unlawful pattern of ABC luring licensees into believing that their renewals are complete and then canceling those applications without prior notice (in writing, by prohibiting the sale of alcohol or otherwise) and without an opportunity to be heard). ABC's unlawful pattern of conduct ignores Idaho statutes to the detriment of the very citizens that the statutes were designed to protect. Señor Iguana's is not the first licensee to be negatively impacted by ABC's approach of renewing license prior to receiving payment and then permitting licensees to continue selling liquor by the drink under the renewed license until the grace period expires. Notwithstanding the recent history of problems that this system has caused, ABC has not taken any steps to change its practice. ABC continues to ignore the statutory duty placed upon it by permitting licensees to sell liquor by the drink during the grace period even though the license has not been properly renewed.

IV. THE ORDER ENTERED BY ABC AND SERVED UPON SEÑOR IGUANA'S WAS MADE UPON UNLAWFUL PROCEDURE.

ABC does not attempt to argue that the Order was lawfully entered. Instead, and as mentioned before, they simply take the position that they didn't take any action and were not required to take any action so there is nothing for this Court to review. This again is the only argument ABC can make because it is clear that ABC did not follow the procedures required for revoking a license or the procedures for acting by way of an emergency proceeding. Señor Igauana's has already pointed out the numerous deficiencies in the procedure in which ABC issued the Order. Because of all of the deficiencies noted by Señor Iguana's, ABC now wants to claim that the Order was not in fact an order (or agency action) and that it was merely notification.

However, once ABC issued the renewed license it had to take some action to cause Señor Iguana's to cease selling alcohol and to cancel the license. Señor Iguana's had a liquor license hanging in its restaurant that had an expiration date that hadn't lapsed and Señor Iguana's was selling and would have continued to sell liquor believing that there was nothing wrong with the renewal application. Señor Iguana's need not recite all of the deficiencies with ABC's procedure here, but wants to reassert its position that ABC acted and that such actions were procedurally defective. The receipt and review of the renewal application, the issuance of instructions for the renewal of licenses, the issuance of the renewed license, and the issuance of an Order cancelling the license, together with its failure to perform the duty to prohibit the sale of liquor during the grace period are all agency actions subject to review.

Instead of defending its actions and attempting to justify or explain how its actions were proper, ABC relies solely on the position that the liquor license expired by operation of law and that the action or inaction of ABC is not in fact an action and hence there is no need to evaluate

the statutory procedural safeguards or due process rights of Señor Iguana's. This position is nonsensical. ABC clearly acted or failed to act and its actions and inactions violated constitutional and statutory provisions, exceeded its statutory authority, were made upon unlawful procedure, were not supported by evidence on the record, and were arbitrary, capricious and an abuse of discretion.

V. ABC IS NOT ENTITLED TO FEES ON APPEAL, AND SENOR IGUANA'S IS ENTITLED TO FEES ON APEAL.

Idaho Code § 12-117(1) provides that where a state agency is an adverse party to a proceeding, including on appeal, the prevailing party is entitled to reasonable attorney's fees, witness fees and other reasonable expenses, if the nonprevailing party acted without a reasonable basis in fact or law. There is no case law from the Idaho Supreme Court or Court of Appeals or statutory law that provides that a liquor license expires by operation of law *after* ABC has renewed and thereby extended the expiration date of the license. Therefore, Señor Iguana's does not believe that in bringing this appeal that it could be deemed to have no reasonable basis in fact or law.


Señor Iguana's believes ABC has acted without a reasonable basis in fact or law. The clear and unambiguous language of I.C. § 23-908(1) placed a duty upon ABC to prohibit Señor Iguana's sale of liquor during the grace period. As mentioned above, ABC violated other statutes with respect to Señor Iguana's liquor license. ABC's failure to perform these statutory duties was a clear violation of law and resulted in the unconstitutional deprivation of Señor Iguana's liquor license. ABC's failure to perform these statutory duties has no basis in fact or law. As such, and as argued in the Appellant's Opening Brief, Señor Iguana's should be awarded its fees and costs.

CONCLUSION

Based upon the foregoing, Señor Iguanas respectfully requests that the ABC Order be set aside and that Señor Iguanas' liquor license be reinstated. Señor Iguanas also requests an award of its attorney fees and costs on appeal.

DATED this 4th day of November, 2015.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED


By: 
BRETT R. CAHOON
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of November, 2015, I served two (2) true and correct copies of the above and foregoing document to the following person(s) as follows:

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